

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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4 IN RE:) Case No. 1:17-md-2804
5 NATIONAL PRESCRIPTION)
6 OPIATE LITIGATION) Friday, November 22, 2024
) 11:02 a.m.

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10 TRANSCRIPT OF STATUS CONFERENCE PROCEEDINGS

11 *HELD VIA ZOOM VIDEOCONFERENCE*

12 BEFORE THE HONORABLE DAN AARON POLSTER

13 UNITED STATES DISTRICT JUDGE

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25 Proceedings recorded by mechanical stenography; transcript produced with computer-aided transcription.

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17 ALSO PRESENT:

18 Helen Norton
19 Carrie Roush
20 Corey McCardle
Andrew Rivera
A. Scott Loge

1 FRIDAY, NOVEMBER 22, 2024

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3 (Proceedings commenced at 11:02 a.m.)

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5 THE COURT: All right.

6 Good morning, everyone.

7 This is a Zoom conference in the MDL with two PBMs,
8 Express Scripts, OptumRx, and PEC and the plaintiffs'
9 lawyers litigating those cases.

10 I've reviewed everyone's status reports. The parties
11 have selected Ogdensburg, New York, as the second
12 bellwether. The proposed CMO is due on December 5th, and
13 people can start working on that case.

14 I thought I talked briefly -- there's a matter that is
15 on the bottom of the second page of the PBMs' status report.

16 Looks like the PEC requested deposition dates for four
17 ESI fact witnesses. According to the report, ESI refused to
18 confirm the dates unless the PEC agrees not to seek to
19 reopen the depositions based on later-produced documents.

20 Is that the case? I'll deal with that now. I'm...

21 Yeah. Go ahead.

22 MR. COOPER: Your Honor, this is Jonathan
23 Cooper for Express Scripts.

24 That's not the case. It's a bit of an overstatement
25 in short, and we've had separate conversations with the PEC

1 about this. We're hoping to resolve it. But the issue,
2 from our perspective, is there are upcoming productions that
3 everyone knows are coming, the parties have agreed on, there
4 are set deadlines.

5 For example, we have productions coming in December --
6 due by December 6th and by December 20th, and our point to
7 the PEC was some of these documents may relate to the
8 witnesses you have requested, and so if you want to depose
9 them, you need to be aware there may be additional documents
10 coming related to them. And we don't think that if -- if
11 you're going to depose them now, you should be allowed to
12 redeposit them based on documents you know are about to be
13 produced. That was our concern. It wasn't a blanket "You
14 can never seek to reopen if you think you have good cause";
15 it was "We all know there are these documents coming."

16 MR. WEINBERGER: So, Judge -- this is Pete
17 Weinberger -- and I'm going to defer if necessary to others
18 that were directly involved in the communication. But the
19 witnesses that we've requested are witnesses who ESI has
20 represented have -- they have completed the custodial
21 document production with respect to those witnesses. And so
22 the documents that Mr. Cooper is talking about relates to
23 what we have been referring to as noncustodial file
24 documents, and primarily those documents are due on
25 December 6th.

1 Now, having told the defendants who we'd like to
2 depose, hopefully in December, to the extent that there are
3 additional documents in this noncustodial production that
4 relate to those witnesses, they should be prioritizing those
5 if they're concerned.

6 But let's assume that we move forward on the
7 representation that their custodial files have been
8 completely produced as part of the reason why we selected
9 these particular witnesses. If in fact we take the
10 deposition and there is a tranche of documents that get
11 produced in January or February that we believe are
12 specifically relevant to these witnesses, you know, we'll
13 follow what the precedent that we've -- that has been
14 established for seven years and come to Special Master Cohen
15 or you and say, "Look, we have good cause for reopening the
16 deposition." That has rarely happened, but, you know, I
17 think...

18 So that's where we are. I mean, we're happy to
19 discuss this more, but we were taken aback by their initial
20 position.

21 MR. COOPER: Well, I...

22 And, Pete, if I may just add one additional point
23 here.

24 So you're correct that from our perspective these
25 particular witnesses' custodial documents are complete. The

1 issue is there are noncustodial documents that may relate to
2 them. And, in addition, because we just selected a new
3 bellwether, our -- we haven't heard from the PEC yet about
4 it, obviously it just got selected, but we anticipate you
5 might request documents about the new bellwether and, in
6 particular, new noncustodial documents.

7 And to give one very concrete example, one of the
8 witnesses you ask about helps run the fraud, waste, and
9 abuse investigations at Express Scripts. And we haven't
10 produced fraud, waste, and abuse investigations for the new
11 bellwether because it was only just selected yesterday.
12 Those documents, there's no schedule for production yet. We
13 haven't tried to collect them yet. I don't know exactly
14 when those will be collected and produced, but if those do
15 end up getting produced, that's something that everyone can
16 reasonably anticipate now, and we don't want our witnesses
17 to have to sit twice.

18 So if you're okay proceeding without, you know -- on
19 that understanding, that's what we've -- we've been talking
20 about here. Our concern is not about some documents being
21 produced down the line that nobody anticipates; it's we all
22 know these documents are coming, and we don't want
23 witnesses -- current or especially former witnesses -- to
24 have to sit two separate times.

25 THE COURT: I have a question. What exact --

1 when you use the term "noncustodial documents," what is a
2 noncustodial document?

3 MR. COOPER: A noncustodial document, Your
4 Honor, can mean different things, but generally speaking, it
5 means documents that aren't stored in the -- in a particular
6 individual's e-mail files --

7 (Unreportable speech from unidentified
8 participant.)

11 MR. COOPER: So examples could be things like
12 contracts or, you know, investigative reports, things that
13 aren't necessarily stored at a given custodian but the
14 company maintains in some location that we are searching,
15 collecting, and producing from.

16 THE COURT: All right.

17 Well --

18 MR. WEINBERGER: So, Your Honor --

19 THE COURT: All right.

20 Now, look, all I'm going to say is this. Ideally
21 people are only deposed once. Sometimes it's necessary to
22 reopen a deposition if -- if relevant documents get produced
23 later and you need to ask that witness just about those new
24 documents. It doesn't make sense to depose a witness on
25 December 1st if you know on December 6th a significant

1 number of documents are going to be produced that you're
2 going to want to ask that witness about.

3 So, I mean, you ought to be able to figure this out.
4 You know, you don't want to delay things indefinitely, but
5 you need to be efficient. So I think you ought to -- you
6 ought to be able to work this out. I'm not going to --
7 there really isn't anything before me. I just -- I didn't
8 think that -- that the issue was exactly how it was
9 described on page 3 because everyone knows that you can
10 always seek leave of court to redepose a witness based on
11 something that's produced after the deposition. So just
12 try -- try and be as efficient as possible, but you don't
13 want to delay this discovery indefinitely.

14 All right. Trying to think when it makes sense to
15 have another Zoom. I'm thinking roughly 60 days. Given the
16 holidays, 30 days is -- you know, doesn't make sense, so
17 I -- I'm suggesting 60 days. Does anyone think that's too
18 soon?

19 All right. Well, seems about right to me, so I'm
20 suggesting -- I've got a couple other ones on Wednesday,
21 January 29th.

22 So how's 9:15 on Wednesday, January 29?

23 MR. BOONE: This is Brian Boone for OptumRx.
24 That would work for us, Your Honor.

25 THE COURT: Thank you, Brian.

1 MR. COOPER: This is Jon Cooper for Express
2 Scripts.

3 That would also be fine with us.

4 THE COURT: All right.

5 And then I guess we can get status reports -- why
6 don't we just say noon on Monday, the 27th.

7 MR. COOPER: Your Honor, would it be possible
8 to do it by 3 PM?

11 All right.

12 MR. RICE: Judge --

13 THE COURT: I didn't have anything else.

14 MR. RICE: -- we have Costco set at 10:00 on
15 the 29th.

16 THE COURT: I'm sorry. What on the 29th?

17 MR. RICE: I have a Costco status conference.

18 THE COURT: Yeah, on -- yeah, on the -- that's
19 right. I've got a -- there are a couple others on the 29th.
20 This one's at 9:15. I think 45 minutes should certainly be
21 ample.

22 All right. At the risk of opening up Pandora's box,
23 but if there's something that either side wants to raise, I
24 want to keep -- keep this litigation moving forward, the
25 floor is open.

1 Okay. There wasn't anything else that came up other
2 than I continue to maintain that it makes sense to -- for
3 each side to look -- look hard at opportunities to try and
4 resolve this. I mean, we now have two bellwethers, we'll be
5 plowing away, we may need one or two trials, even if we have
6 them. Of course that doesn't have to end anything, so I...

7 I want the parties to remain focused on, you know --
8 on the issues that the PEC correctly outlined on page 1 of
9 their report. Those are their primary allegations. The
10 question is whether the documents and the testimony support
11 those allegations. I know the PEC has vigorously denied all
12 three of them, so -- I want the parties to focus on those
13 issues and, you know, see what the evidence shows and
14 keep -- you know, keep your eye open on the -- on the end of
15 this, okay? And that's what I'm focusing on.

16 All right. Have a good Thanksgiving, and I'll talk to
17 everyone at the end of January; and good holidays, too, at
18 the end of December.

19 (Proceedings concluded at 11:14 a.m.)

C E R T I F I C A T E

21 I certify that the foregoing is a correct transcript
22 of the record of proceedings in the above-entitled matter
23 prepared from my stenotype notes.

24 /s/ Gregory S. Mizanin November 25, 2024
GREGORY S. MIZANIN, RDR, CRR DATE